IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4240 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TARACHAND SOHANLAL BOHARA (JAIN)

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 4240 of 2004

MR ABHAYKUMAR P SHAH for Petitioner No. 1-4

MR RM CHAUHAN APP for Respondent No. 1

MR KIRIT I PATEL for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 14/12/2004

ORAL JUDGEMENT

1. Heard learned Advocate Mr. S.V.Raju for Mr. AB Shah for the petitioners, learned APP Mr. R.M.Chauhan for respondent No.1 State and learned Advocate Mr. Kirit I. Patel for respondent No.2 original complainant. Rule. Waived by learned APP Mr.R.M.Chauhan for respondent No.1 State and learned Advocate Mr. K.I. Patel for respondent No.2 Upon request of learned Advocates for the parties, the matter was heard finally and is decided accordingly.

2. Present respondent No.2 Bhanvarlal Champalal Kanunga , Director of Welcome Psyllium Pvt. Ltd., Unjha, preferred a Criminal Complainant, bearing Criminal Case No. 1123 of 2003, in the court of Judicial Magistrate, First Class at Unjha, against in all 8 accused including 4 present petitioners. The sum and substance of the complainant filed by respondent No.2 is that he being Director of Welcome Psyllium Pvt. Ltd., doing business in cumin, psyllium, etc. Present petitioner No.2 on 4th of September, 2003 requested complainant to purchase 560 bags of cumin from Unjha for accused No.2 Manoharlal Sohanlal Bohara (Jain). It was also requested that after a week, accused No.2 Manoharlal Sohanlal Bohara, would visit Unjha to take the delivery of goods and settle the accounts. Accused Khushalchand Kisanlal Bardiya, who is not petitioner herein, also requested like wise on phone to the complainant to purchase cumin from the market and along with one Ashokkumar Bansilal Kotecha and Anil Chhajed Dhulia, would reach Unjha on next Sunday. Therefore, complainant on 4th of September, 2003, purchased 205 bags of cumin, worth of Rs. 7,35,806 from one Vinaykumar & Co. and on 5th of September, 2003, he also purchased 197 bags of cumin, worth of Rs.7,03,148 from Vinaykumar & Co., Unjha. On 6th of September, 2003, further 160 bags of cumin also came to be purchased by complainant respondent No.2 herein worth of Rs. 5,23,600/-, totalling of Rs. 19,62,554/-. This amount, according to complainant, he paid to the respective sellers on behalf of the accused. Adding commission, etc. the total quantity of cumin was worth Rs. 19,95,782/-. On 13th of September, 2003, all the accused visited Unjha and respondent No.2 show them the quantity of cumin which he had purchased. Accused requested him to sell quantity of cumin without bills, but the complainant refused. So, in all 562 bags of cumin vide Bill Nos. 11 and 12 of Pawankumar Kapilkumar Mahavir, Bijay Nagar, Rajasthan, was prepared and in pursuance of FOR contract, the accused took delivery ex-godown. Accused No.3 - petitioner No.3 herein Pawankumar Bhanvarlal Jain, asked accused No.1 petitioner No.1 herein Tarachand Sohanlal Bohara to sign the bills and,

therefore, he signed bills No. 11 and 12. The trucks were hired by accused No.8 (non-petitioner) Shri Lekhraj Mulchand Maheshwari and the quantity of cumin was shifted out of State in the said truck. According to complainant, original accused No.4 Rajendra Surajkaran Binani (petitioner No.4 herein) is brother of one Narendra Binani, who is doing his business at Pali, Rajasthan. Narendra Binani guaranteed on behalf of the accused about the payment of quantity of cumin and advised complainant to enter into the transaction without any reservation with Rajendra Binani. On 30th of October, 2003, accused No.2 petitioner No.1 herein talked to the complainant and forwarded a fax message and stated that within a week time the payment of amount of Rs.19,62,554/- would be made. On 31st of October, 2003, complainant talked to some of the accused on phone and they in turn stated that the accused were 8 partners and all of them still had not contributed towards the sale price. The complainant also contacted partner Ashok Kotecha and Khushalchand Bardiya, who said that they had no money at that time and payment might take little time. Complainant said that it was not proper. In reply, Ashokumar Kotecha and Kushalchand stated that complainant was free to take any legal course and nobody can do anything wrong with them because except Tarachand Jain accused No.2, none had signed the bills. Therefore, complainant as stated in the last para of his complaint, committing fraud and by inducement took the delivery of the goods, for a promise to make payment within a week, and did not pay any amount. The complainant stated in the complaint that if civil action was to be taken, then it was likely to take time. He was a Director of one private limited company, and if the payment was not made, the company would suffer financial crisis and was likely to be closed. Therefore, it was requested in the complaint that the investigation be handed over to the Police Officer of Unjha, who in turn might recover the amount or recover the goods. He also gave the list of documentary evidence as well as oral witnesses in the complaint. After recording verification below the complaint, learned Judicial Magistrate, First Class, Unjha, vide his order dated 1st of November, 2003, was pleased to issue process against all the accused for the offences punishable under Sections 406 and 420 of the Indian Penal Code.

3. The said complaint and the said order of the learned Judicial Magistrate, First Class, is in question in this Application as it is prayed that Criminal Case No.1123 of 2003 pending before the Judicial Magistrate, First Class, Unjha, qua the present petitioners be

quashed and the process issued thereunder be set aside. However, out of the 8 accused, against whom the process is issued, only four accused have preferred this Application under Section 402 of the Code of Criminal Procedure.

4. Learned Advocate Mr.S.V.Raju on behalf of the petitioners stated that the first and foremost submission of him would be, charge under Section 406 as well as under Section 420 cannot stand together on the same facts. He relied upon certain decisions on this aspect, which will be discussed later on. His second submission was in respect that no prima facie case disclosed by the complaint in respect of offence punishable under Section 406 of the IPC. He, with the aid of decisions of the Supreme Court, contended that entrustment of property or domain over property as used in Section 4 of IPC would mean that the property, which was entrusted to someone else, even thereafter such delivery, continued to be the property of the complainant, and in those circumstances only, the offence under Section 406 of the Indian Penal Code could be made out. It was stated that the present case was of outright sale. In cases of outright sale, the question of entrustment within the meaning of Section 406 would not arise because the ownership with the sale would not remain of the complainant thereafter. He contended that if the complaint is taken on its face value, it clearly appears that it is a case of sale, and it is not a case of entrustment of property, over which after entrustment, the ownership continued of the complainant. The third submission which Mr. Raju made was in respect of offence punishable under Section 420 of the Indian Penal Code. He stated that to complete the offence under Section 420 of the IPC, the element of cheating not only should appear from the complaint but must have been averred so as to take the proceedings further. In this respect, he relied on some decisions, which will be discussed later on. He stated that there is no inducement on the part of present petitioners to deliver the goods with dishonest or fraudulent intention. These averments do not find its place in the complaint and therefore when foundation in this respect is not laid down, the complaint lacks those elements prima facie. It was lastly contended that the Magistrate therefore wrongly issued process in the above said two offences against the present petitioners because in view of his contention, there were no grounds of proceedings against accused in respect of complaint. He stated that his case is covered in Category No.1 as observed in para 108 of STATE OF HARIYANA vs. BHAJANLAL, as reported in AIR 1992 SC 604. He contended that there is no prima facie case

disclosed by the complainant and, therefore, there is no other remedy except to invoke the powers under Section 482 of the Code of Criminal Procedure. He vehemently urged to allow the petition and quash the complaint.

5. On the other hand learned Advocate for the respondent No.2 complainant stated that the delivery of the goods was made to the accused only on their inducement to deliver the said goods to the accused. It was stated that the role of the complainant was of commission agent in the whole transactions. He purchased the goods on behalf of the accused as commission agent and paid the amount to the seller by cheque. The accused did not make the payment of the goods at the time of the delivery and not even a week thereafter as promised. According to learned Advocate Mr. Patel, this shows that the intention of the accused from the beginning was to cheat the complainant to the extent that to obtain the delivery of the goods and not to make payment and accused wrongfully gained themselves and caused loss to the complainant. It is stated that the conduct of the accused also denotes intention on the part of them as accused brought their own vehicles to shift the goods from Unjha to their destination. The averments made in the complaint about delivery of goods without bill also discloses the intention of the accused because if the goods are sold without bills, there could not be any responsibility of making payments of the goods. In respect of Section 406 and Section 420 of the Indian Penal Code, learned Advocate for the complainant relied upon a decision of this Court in the matter of RAJENDRAKUMAR CHAKARAVARTI vs. COOPERATIVE BANK OF BARODA, as reported in 1997 (4) GCD 520 (Guj) wherein the court permitted framing of alternative charges under Sections 406 and 420 of the IPC.

6. Learned Advocate Mr. Patel also relied upon a decision of the Supreme Court in the matter of STATE OF HARIYANA vs. BHAJANLAL, as reported in AIR 1992 SC 604 and in the case of M. KRISHNAN vs. VIJAY SINGH, as reported in 2001 AIR SCW 4142 wherein it is held that quashing the complaint merely on the ground that the nature of dispute was of civil nature is not proper. The nature of transaction may not be a deciding factor but the intention of the parties must be looked into. Learned Advocate Mr. Patel also relied upon a decision of the Supreme Court in the matter of JAGADISH RAM vs. STATE OF RAJASTHAN AND ANOTHER, as reported in (2004) 4 SCC 432, wherein the Supreme Court held that at prima facie stage while taking cognizance of a private complaint, Magistrate has only to decide whether there is

sufficient ground for proceeding further. The order passed by the Magistrate for issuing process in the said case was challenged before the High Court under Section 482 of the Cr.P.C. and High Court declined to interfere. The Supreme Court approved the decision of the High Court. Learned Advocate Mr. Patel also stated that till today, nothing has been paid by the petitioner towards the sale of cumin which reveals their intention to defraud. My attention was drawn to the affidavit-in-reply filed by respondent No.2 in the matter, wherein he has stated that he was induced to sell the goods and the accused had cheated him.

7. From the contentions of learned counsels and from the record available with this court, it is to be decided whether interference is required as prayed by the petitioners. The law in this respect is settled that at this stage interference under Section 482 of the Cr. P.C. by High Court must be in rarest of rate case and where the case is covered by any of the 8 categories settled by the Apex Court in Bhajanlal's case for preventing the abuse of the process of court and to meet the ends of justice. Therefore, the primary requirement would be to ascertain whether complaint in question discloses prima facie ingredients of offence complained of. Difficulty arises when an act of accused constitutes civil wrong as well as criminal act. A careful scrutiny in such cases is required. Though merely because a civil dispute has arisen between parties would not absolve any party from penal liability nor mere pendency of civil action would itself can be made ground for quashing complaint/FIR. Therefore, the test is whether complaint or FIR discloses on bare reading prima facie ingredients of an offence.

8. On careful scrutiny, it is certain that so far as allegation under Section 406 is concerned, by averments made in the complaint itself, it is a transaction of absolute sale. The case therefore is covered by a decision of the Supreme Court in the matter of STATE OF GUJARAT vs.JASWANTLAL NATHALAL, as reported in AIR 1968 SC 700, wherein it was made clear by the Apex Court that the word "entrustment" found in Section 405 of the IPC carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. The same view is also expressed by the Court in the matter of CENTRAL BUREAU OF INVESTIGATION vs. DUNCANS AGRO INDUSTRIES LIMITED, CALCUTTA, as reported in (1996) 5 SCC 591. A decision of this Court in the matter of RAVINDRA C. MEHTA vs. MUSTA HUSSEIN KARAM HUSSEIN, as reported

in 1984 GLH 1106 expresses the same view. From reading the complaint itself, it is clear that it was a case of outright sale and the complainant had no domain over the property which was sold and, therefore, there was no entrustment as to attract prima facie ingredients of Section 406. True it is that, when it is not clear that what offence is committed, it may be either under Section 406 or under Section 420 of the Indian Penal Code, court is always empowered to frame alternative charge, but when on primary reading, without subtracting or adding anything to the complaint when it does not disclose any ingredients of Section 406, the question of framing alternative charge by the Magistrate would not arise.

9. So far as allegation in respect of Section 420 of the IPC is concerned, though heavy reliance is placed on a decision M.Krishnan vs. Vijay Sing (supra) for the contention that merely the dispute is civil nature, it cannot be said that the transaction would not invite penal provision. Though in that particular case, allegation was also in respect of Section 471 of the Indian Penal Code for forging of the document. In said case, the Supreme Court also referred a decision of RAJESH BAJAJ vs. STATE OF NCT OF DELHI, as reported in AIR 1999 SC 1216. The Supreme Court observed that the crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. In that particular case, the complainant had stated in the body of the complaint that he was induced to believe that respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. While examining the case from this angle, when we come to the complaint filed, I do not find any averment in the complaint, which would denote the intention of the accused to defraud the complainant. Mere fact of non-payment till date would not turn the breach of contract in criminal action. In the complaint it appears that instead of relying upon the representation of the accused as narrated in para-2, the complainant relied upon the assurance given by one Rajendra Binani, as narrated in para-5 of the complaint. What appears from the averment is the complainant entered into a contract to sell cumin and did business instead of being induced by the accused dishonestly or fraudulently as to sell the quantity of cumin to present petitioner. The present petitioner No.1 also signed the bills. Merely because for shifting the quantity of cumin, the accused employed their own hired truck would not render the intention of

the accused criminal to the extent of liability under Section 420 of the IPC. Except that, in body of the complaint, nowhere it is stated that complainant was induced dishonestly or fraudulently to sell the quantity of cumin to the accused. Therefore, prima facie, without subtracting or adding anything in the complaint, it does not disclose any ingredients of criminal liability as discussed above. The transaction appears to be purely of civil nature where there is absence of inducement on the part of the accused. True that interference at very prima facie stage under Section 482 of the Cr.P.C. must be in rarest of rare cases and in exceptional circumstances. At the same time, the criminal machinery must not be allowed to be a tool to oppress persons so as to short cut the recovery of amount due in a purely civil dispute. That would amount to abuse of process of law.

10. In the result, in view of above discussion, this Application is allowed. Complaint being Criminal Case No. 1123 of 2003 pending before the court of Judicial Magistrate, First Class at Unjha and the process issued in the said complaint by learned Magistrate on 1st of November, 2003 are quashed so far as present petitioners are concerned. Rule made absolute to the above extent. D.S. permitted.

(J.R. Vora, J.)

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